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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL RODRIGUEZ, 34 TURK
STREET, #343, SAN FRANCISCO, CA
94102

Plaintiff,

vs.

THE CITY AND COUNTY OF SAN
FRANCISCO,

Defendant.

Case No. C08-2639 SI

**DEFENDANT CITY AND COUNTY OF
SAN FRANCISCO'S MOTION TO
DISMISS FOR FAILURE TO STATE A
CLAIM AND LACK OF
JURISDICTION, OR IN THE
ALTERNATIVE FOR A MORE
DEFINITE STATEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[F. R. CIV. P. 12(b)(6), 12(b)(1), 12(e)]

Judge: Hon. Susan Illston
Hearing Date: July 25, 2008
Time: 9:00 A.M.
Place: Crtrm. 10, 19th
Floor

Date Action Filed: May 27, 2008
Trial Date: Not set

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Federal Statutes

28 United States Code

§ 13322

Federal Rule of Civil Procedure

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Federal Rule of Civil Procedure

§ 12(b)(1)2

Federal Rule of Civil Procedure

§ 12(b)(6)1

NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TO PLAINTIFF IN PRO PER:

TAKE NOTICE THAT on July 25, 2008 at 9:00 a.m. in Courtroom 10 at 450 Golden Gate Ave., San Francisco, California, 19th Floor, Defendant City and County of San Francisco ("City") will and hereby does move to dismiss the Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). In the alternative, the City will and hereby does move for a more definite statement of the pleadings under Fed. R. Civ. P. 12(e). This motion is based upon this notice, the attached memorandum of points and authorities, the court file for this matter, and any argument that may be heard.

MEMORANDUM OF POINTS & AUTHORITIES**I. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE CITY AND COUNTY OF SAN FRANCISCO**

For the purposes of this motion to dismiss, the City accepts the material allegations in the complaint as true and construes the allegations in the light most favorable to plaintiff. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). This Court, however, "is not required to accept legal conclusions cast in the form of factual allegations, if those conclusions cannot reasonably be drawn from the facts alleged." *Hisamatsu v. Niroula*, 2008 U.S. Dist. LEXIS 9194, *10 (N.D. Cal. Jan. 10, 2008) (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)). Here, dismissal is proper because plaintiff has failed to assert a cognizable legal theory. Needless to say, plaintiff also failed to allege sufficient facts under a cognizable legal theory. *See SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 782 (9th Cir. 1996); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). Dismissal is appropriate because plaintiff can prove no set of facts that support his claim against the City. *See Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990).

Plaintiff alleges that a "medical Spanish, social worker" suspended his medical card. He does not allege that this social worker is a City employee. As plaintiff does not identify any statutory basis for liability against San Francisco, any state law claims must be dismissed. *See Eastburn v. Reg'l*

1 *Fire Protection Auth.*, 31 Cal. 4th 1175, 1183-84 (2003) (“[the] direct tort liability of public entities
 2 must be based on a specific statute declaring them to be liable, or at least creating some specific duty
 3 of care...”); *see also Walker v. County of Santa Clara*, 2005 WL 2437037 (N.D. Cal. Sept. 30, 2005)
 4 (dismissing state claims). Under California law, all common law and judicially declared forms of
 5 liability for public entities are abolished. Gov’t Code §815 *et seq.* A public entity is immune from
 6 and not liable for any injury, except as specifically provided by statute. Gov’t Code §815(a); *Brown*
 7 *v. Poway Unified School District* (1993) 4 Cal. 4th 820, 829.

8 Plaintiff also fails to state any federal law claims. Even had plaintiff alleged that the social
 9 worker was a City employee who deprived him of his rights under the Constitution or laws of the
 10 United States in violation of 42 U.S.C. section 1983, he fails to state a claim against the City. The
 11 City is not liable for the actions of its employees alone and plaintiff has not alleged that the social
 12 worker acted pursuant to any City policy, practice, or custom. *See Monell v. Dept. of Social Services*,
 13 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

14 Although allegations drafted by pro se plaintiffs are held to a "less stringent standard" than
 15 those prepared by lawyers, plaintiff's complaint cannot be construed as stating a claim against the
 16 City. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980).

17 **II. THIS COURT LACKS SUBJECT-MATTER JURISDICTION**

18 Plaintiff has not stated a claim over which this Court has subject-matter jurisdiction, and so
 19 his Complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(1). Federal courts are
 20 courts of limited jurisdiction; thus, the Court presumes lack of jurisdiction, and the party invoking the
 21 court's jurisdiction bears the burden of proving that subject matter jurisdiction exists. *See Kokkonen*
 22 *v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994).

23 Plaintiff has not alleged any facts proving that this Court has subject matter jurisdiction over
 24 this action. Plaintiff does not identify any violation of federal law or the Constitution in his
 25 Complaint. Plaintiff alleges that he lives in San Francisco, California. This Court therefore lacks
 26 diversity jurisdiction under 28 U.S.C. section 1332.

PROOF OF SERVICE

I, MICHAEL K. LUCERO, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Sixth Floor, San Francisco, CA 94102.

On June 17, 2008, I served the following document(s):

DEFENDANT CITY AND COUNTY OF SAN FRANCISCO'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND LACK OF JURISDICTION, OR IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT; MEMORANDUM OF POINTS AND AUTHORITIES

on the following persons at the locations specified:

DANIEL RODRIGUEZ

In Pro Per

34 Turk Street, #343

San Francisco, CA 94102

Tel. (415) 567-4951

in the manner indicated below:

☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery** ☐ **is attached** or ☐ **will be filed separately with the court.**

☐ **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed June 17, 2008, at San Francisco, California.

MICHAEL K. LUCERO